Supreme Court, U.S.
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No. 00-1816

In the

Supreme Court of the United States

RAYMOND G. VARGA; KATHRYN M. VARGA,

Petitioner,

versus

ROCKWELL INTERNATIONAL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ROCKWELL INTERNATIONAL CORPORATION

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QUESTIONS PRESENTED

1. Whether the district court properly denied, and the circuit court properly affirmed the denial of, the motion for judgment as a matter of law made at the conclusion of all proofs by the plaintiffs, the parties having the burden of proof?

2. Whether this Court should decline to consider plaintiffs' argument concerning the district court's decision to permit respondent to utilize Trial Exhibits 69 and 70 to cross-examine plaintiffs' witness, Mr. Lemanski, where plaintiffs' counsel failed to object to the admission of those exhibits and stipulated to a jury instruction that defendant had properly met its discovery obligations?

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

A. Introduction 1

B. Trial Proceedings..... 4

1. Trial Exhibits 69 and 70 4
2. Patrick Hannon..... 6
3. Gregory Brown..... 10
4. Denial of Plaintiffs Motion for Judgment as a Matter of Law..... 19

REASONS FOR DENYING THE PETITION..... 21

I. WHILE IT IS CORRECT TO SAY THAT THE STANDARD FOR SUMMARY JUDGMENT IS THE SAME AS THE STANDARD FOR JUDGMENT AS A MATTER OF LAW, THAT LEGAL PRINCIPLE WAS NOT BEFORE THE UNITED STATES DISTRICT COURT OR BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. THE ISSUE WHICH WAS PRESENTED TO, AND DECIDED BY, BOTH LOWER COURTS INVOLVED THE DISTINCT QUESTION RELATING TO HOW A MOTION FOR JUDGMENT AS A MATTER OF LAW (OR FOR THAT MATTER A MOTION FOR SUMMARY JUDGMENT) IS TO BE DECIDED WHEN THE MOVANT IS THE PARTY HAVING THE BURDEN OF PROOF. THE DISTRICT COURT PROPERLY DENIED, AND THE CIRCUIT COURT PROPERLY AFFIRMED THE DENIAL OF, PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF

LAW MADE AT THE CONCLUSION OF THE PROOFS. 22

II. THIS COURT SHOULD DECLINE TO REVIEW PLAINTIFFS' ARGUMENT CONCERNING THE ADMISSION OF EVIDENCE USED SOLELY FOR THE PURPOSE OF IMPEACHMENT BECAUSE THE ARGUMENT MADE BY PLAINTIFFS IN THE SIXTH CIRCUIT WAS NOT MADE IN THE DISTRICT AND THE ARGUMENT MADE BY THE PLAINTIFFS NOW WAS NOT MADE IN EITHER LOWER COURT. 27

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Adickes v. Kress & Co.,
398 U.S. 144, 147(1970) 21
Anderson v. Liberty Lobby, Inc.,
477 U.S. 242(1986) 23, 25
Brocklehurst v. PPG Industries, Inc.,
123 F.3d 890, 895 (6th Cir. 1997) 25
Chappell v. G.T.E. Products,
803 F.2d 261, 266 (6th Cir. 1986), cert. denied
480 U.S. 919(1987) 23
Daniel J. Hartwig & Assoc., Inc. v Kanner,
913 F.2d 1213, 1221 (7th Cir. 1990) 24
Delta Airlines v. August,
450 U.S. 346, 362(1981) 28
Demjanjuk v. Petrovsky,
10 F.3d 388 (6th Cir. 1993) 28, 29
Dubey v. Stroh Brewery Co.,
185 Mich. App. 561(1990) 26
Finch v. Hercules, Inc.,
941 F. Supp. 1395, 1415 (D. Del. 1996) 28
Halbasch v. Med-Data, Inc.,
192 F.R.D. 641 (D. Or. 2000) 29
Hawley v. Dresser Indus., Inc.,
958 F.2d 720 723 (6th Cir. 1992) 23
Hazel-Atlas Glass Co. v. Harford Empire Co.,
322 U.S. 238(1944) 28, 29
Hazen Paper Co. v. Biggins,
507 U.S. 604(1993) 26
Helminski v. Ayerst Laboratories, a Div. of American
Home Products, 766 F.2d 208, 211 (6th Cir. 1985) 28
Hunt v. Cromartie,
526 U.S. 541(1999) 24, 25

Kupkowski v. Avis Ford, Inc.,
395 Mich. 155, 168(1975) 23
Matras v. Amoco Oil Co.,
424 Mich. 675, 683-684(1986) 25
National Equipment Rental, Ltd. v. Stanley,
177 F. Supp. 583 (D.C. N.Y. 1959) 27
Oney v. Ratliff,
183 F.30 93, 895 (Fed. Cir. 1999).....25
Pence v. United States,
316 U.S. 332(1942) 24
Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133, 143(2000) 26
Roush v. KFC National Mgt. Co.,
10 F.3d 392, 395 (6th Cir. 1993) 23
Service Auto Supply Co of PR v. Harte & Co.,
533 F.2d 23 (1st Cir. 1976) 24
St. Mary's Honor Ctr. v. Hicks,
509 U.S. 502(1993) 26
State Auto Ins. Co. v. Boatwright,
184 F.3d 492, 498-499 (6th Cir. 1999) 24
Texas Dept. of Community Affairs v. Burdine,
450 U.S. 248, 253(1981) 26
Torres v. Johnson Lines,
932 F.2d 748, 752 (9th Cir. 1991).....28
Toth v. Yoder Co.,
749 F.2d 1190, 1194 (6th Cir. 1984).....23
U.S. v. Throckmorton,
98 U.S. 61(1878) 28, 29
Youakim v. Miller,
425 U.S. 231, 34(1976).....21

Statutes

Elliott-Larsen Civil Rights Act, M.C.L.A. § 37.2201 4
Employment Act, 29 U.S.C. § 621 4
F.R.E. 103(a)(1)..... 28

STATEMENT OF THE CASE

A. Introduction.

In 1995, the Heavy Vehicle Systems (HVS) business unit of defendant, Rockwell International Corporation,[1] ("Rockwell"), failed to meet established business goals and reported an unacceptable financial performance.[2] Further, industry experts were forecasting a significant downturn in the industry. (Yost Testimony, Tr., 11/23/98, Vol. 8, Part 1, pp.9-11). The Rockwell Board of Directors indicated to Mr. Yost that HVS had to be turned around or it would be sold or shut down. As a result, in early 1996 HVS management with the approval of the Board of Directors of Rockwell instituted a program to restructure HVS to enhance efficiency and reduce expenses by 40 percent. (Yost Testimony, Tr., 11/23/98, Vol. 8, Part 1, p.24).

Management within each HVS function was asked to "start with a blank piece of paper" and design what the organization should look like in order to run as efficiently as possible. (Yost Testimony, Tr., 11/23/98, Vol. 8, Part 1,

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[1] Effective October 1, 1997, Rockwell's Automotive Operations became a distinct corporation called Meritor Automotive, Inc.

[2] In November, 1994, the entire upper management team which had been in place at HVS was terminated due to the poor performance of the company. (Testimony of Larry D. Yost, former President of HVS and current Chairman and Chief Executive Officer of Meritor Automotive, Inc.; Tr., 11/23/98, Vol. 8, Part 1, pp.4-7).

pp.33-35). In addition, management was asked to identify those skills necessary for employees to have in the restructured organization. Having made that determination, management was to examine the skill sets of the existing employees to see who best fit the new organization. (Yost Testimony, Tr., 11/23/98, Vol. 8, Part 1, pp.40-42, 79-80).

Each and every employee was considered as a potential candidate for inclusion in the restructuring and reduction in force. Those that best fit were retained. This process resulted in a far-reaching reduction in force that impacted HVS employees in North and South America, Asia and Europe.

Raymond Varga's work area, the vehicle test group, consisted of four salaried engineers. The two most senior engineers and one engineer junior to the Raymond Varga continued with the restructured company. As it was felt that Varga's skill set did not match the needs of the restructured company, he was included in the reduction in force.[3]

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[3] Mr. Varga testified that he was given six months' pay as part of his severance package. (Tr., 11/12/98, Vol. 1, p.13). During that same period, his medical, life and disability insurances were continued as were Rockwell's contributions to his savings plan. (Tr., 11/12/98, Vol. 1, p.13). For every dollar Mr. Varga invested in the savings plan, Rockwell contributed $.75. (Tr., 11/12/98, Vol. 1, p. 96). The value of the savings plan when he cashed it out in September, 1996 was $667,856.26. (Tr., 11/12/98, Vol. 1, pp.97-98).

(Continued on next page.)

Some of plaintiff, Raymond Varga's, job duties were distributed among the three engineers who remained in the department, Jack Worrall, Gerald Lawruk, and Kenneth Lang. In addition, Stephen Federighe, a younger man with greater departmental experience and performance appraisals superior to those of Varga, transferred into the department after Varga was discharged and assumed some of Varga's other duties in addition to his own.

Mr. Federighe remained in the department for approximately 30 to 60 days before he transferred to a position in another department. By the end of the year, Mr. Lang, the most junior of the other three engineers also transferred to a new job. Thereafter, plaintiff Varga's job and that of Mr. Lang were done by hourly-rated, non-engineers. (Testimony of Ron Rogers, Former Manager of HVS's Vehicle Test Group and current Engineering Manager, Test Group, Meritor, Tr., 11/17/98, Vol. 4(B), pp. 64-121; Tr, 11/18/98, Vol. 5, pp.74-150).

(Continued from previous page.)

Mr. Varga also testified that Rockwell had an "85-point" system for pension benefits. The number of points was calculated by adding a person's age plus the number of years he had worked at Rockwell. (Tr., 11/12/98, Vol. 1, p.12). Mr. Varga had only 80 points in August, 1996. Nonetheless, Rockwell gave him a "slider" into retirement which meant that even though he was no longer employed, he could collect a pension from Rockwell at p. 56 in the same amount he would have received if he had worked until he accumulated 85 points. (Tr., 11/12/98, Vol. 1, pp.12-13, 31).

Mr. Varga took exception to his discharge and commenced this action alleging that he was wrongfully terminated and discriminated against on the basis of age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et. seq.* and the Elliott-Larsen Civil Rights Act, M.C.L.A. § 37.2201, *et. seq.*

Following a three-week trial, the jury determined that ". . . Defendant Rockwell International Corporation [did not] intentionally discriminate against Plaintiff Raymond Varga by using age as a determining factor in the decision to discharge Mr. Varga." (Tr., 12/03/98, Vol. 13, p.6).

B. Trial proceedings.

While aware of Rule 15.2's admonition that a brief in opposition "should be stated briefly," Rockwell is compelled to provide this Court with a full, complete recitation of exactly what occurred at trial since that is necessary to an understanding of the petition filed by the plaintiffs and the questions involved.

1. Trial exhibits 69 and 70.

During the course of his direct examination by plaintiffs' counsel, Larry Lemanski (who had been plaintiff's immediate supervisor between 1991 and January, 1996 when he was terminated as part of a reduction in force and who had himself sued Rockwell for age discrimination, (Tr., 11/13/98, Vol. 2, pp.4-15), testified that his supervisor, Ron Rogers, had instructed him to "bring down" everybody's performance evaluation and that the bottom

10 percent of the people were going to be let go.[4] (Tr, 11/13/98, Vol. 2, pp.15-21). He then testified that he would have given plaintiff an excellent minus rating in 1995 but that Mr. Rogers forced him to bring it down to a good plus. (Tr., 11/13/98, Vol. 2, pp.28-29).

On cross-examination, defense counsel showed Mr. Lemanski proposed Exhibit 69 and told opposing counsel that the exhibit was not in the exhibit book because it was offered for impeachment. (Tr., 11/16/98, Vol. 3, p.38). There was no substantive objection from plaintiff's counsel.[5] Mr. Lemanski identified the document as a ranking he had done, in 1995, of the people in his department from 1 to 17 and which also included his proposed performance evaluations of those individuals. (Tr., 11/16/98, Vol. 3, p.38). He testified that the document showed that he had ranked plaintiff 14th out of 17, after earlier stating that had he had to force rank the people in his department he would have ranked plaintiff towards the center – not towards the bottom, (Tr., 11/16/98, Vol. 3, p.37), and that he had originally rated plaintiff "good", which was contrary to his testimony on direct examination. (Tr., 11/16/98, Vol. 3, pp.39, 44). He was then shown Exhibit 70, which was also admitted without objection, (Tr.,

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[4] Mr. Lemanski made it clear that Mr. Rogers did not tell him to include only older people in the bottom 10 percent. He, Rogers, did not want only younger people included in the bottom 10 percent. (Tr., 11/16/98, Vol. 3, p.25).

[5] The only objection made by plaintiffs to Exhibit 69 was the lack of foundation as to its date. That objection was cured by further testimony and Exhibit 69 was admitted. (Tr., 11/16/98, Vol. 3, pp.40-41).

11/16/98, Vol. 3, p.42), which showed the changes which Mr. Rogers had made to Mr. Lemanski's recommendations. Faced with his own document, Mr. Lemanski was forced to admit that Mr. Rogers had, in fact, **raised** plaintiff's 1995 performance evaluation from good to good plus.[6] (Tr., 11/16/98, Vol. 3, p.44).

2. Patrick Hannon.

At trial, defendant called Patrick Hannon, Senior Director of Human Resource Strategic Planning and Leadership Development. (Tr., 11/23/98, Vol. 8, Part 2, pp.3-4). Consistent with the earlier testimony of Mr. Yost and Mr. Rogers, Mr. Hannon testified that in April, 1996, there was a significant restructuring of the business at Rockwell. (Tr., 11/23/98, Vol. 8, Part 2, p.7). The goal of the restructuring was an attempt to reduce Rockwell's cost structure so that it could be more cost competitive in the industry. (Tr., 11/23/98, Vol. 8, Part 2, p.8). He testified that rather than looking at making incremental changes in the way in which the work was getting done, Rockwell decided to go through a re-engineering process which he identified as a "clean sheet of paper" approach. (Tr., 11/23/98, Vol. 8, Part 2, p.10). Mr. Hannon testified that

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[6] Ron Rogers confirmed that the G Plus on defense Exhibit 69 and 70 was the official performance appraisal grade for Mr. Varga for January, 1996. (Tr., 11/19/98, p.4). Mr. Rogers confirmed that Exhibit 70 showed that he had raised the grade for Mr. Varga from a G to a G Plus and that Mr. Varga's performance appraisal from the next month, January of 1996, was a G Plus. (Tr., 11/19/98, p.9).

the objectives of the re-engineering process were (1) profitable growth, (2) significant cost reduction and (3) reducing the complexity of the business. (Tr., 11/23/98, Vol. 8, Part 2, pp.12-13).

Mr. Hannon testified that after the various re-design teams had made their recommendations as to how to re-engineer their work processes and after the re-design head count reduction implementation team had identified individuals who were to be included in the restructuring, Rockwell utilized its human resources information database of employee records to generate information relative to each employee who was identified for the head count reduction. (Tr., 11/23/98, Vol. 8, Part 2, p.33). He testified that some of the information that was compiled at that point in time related to age, gender and race. (Tr., 11/23/98, Vol. 8, Part 2, p.33). The purpose of gathering that information was to start an adverse impact analysis to make sure that Rockwell was not impermissibly adversely impacting any specific work group as a result of the head count reductions. (Tr., 11/23/98, Vol. 8, Part 2, pp.33-34). He identified Jim Pautsch as the individual who did the Adverse Impact Review. (Tr., 11/23/98, Vol. 8, Part 2, p.34). Mr. Hannon identified plaintiffs' Exhibit 32 as the document that Jim Pautsch generated for Rockwell to do the Adverse Impact Analysis. (Tr., 11/23/98, Vol. 8, Part 2, p.34). Mr. Hannon testified that after the analysis was conducted, Rockwell went back and looked at each person that was being reduced, specifically in terms of age, to see if there was anything abnormal in the selection process. (Tr., 11/23/98, Vol. 8, Part 2, p.36). No changes were made as a result of that review. (Tr., 11/23/98, Vol. 8, Part 2, p.36).

Mr. Hannon testified that, subsequently, approval of the reduction plan was sought and obtained from the Senior

Leadership Counsel. (Tr., 11/23/98, Vol. 8, Part 2, p.46). The presentation to the SLC took place on August 13, 1996. Mr. Hannon testified that the SLC was given, *inter alia,* statistical overviews as to what the impact to the organization by age, gender and by grade level. (Tr., 11/23/98, Vol. 8, Part 2, pp.46-47). That information was set forth on defendant's Exhibit 44. (Tr., 11/23/98, Vol. 8, Part 2, p.47).

Mr. Hannon testified that in preparing for the SLC presentation, an informal analysis was done in relation to the head count. Mr. Hannon began to testify as to the outcome of that analysis relative to age. Plaintiffs' counsel "objected". (Tr., 11/23/98, Vol. 8, Part 2, p.49). Her "objection" was actually a question as to what Mr. Hannon was referring. He stated that he was not referring to Exhibit 44 but, rather, was referring to the presentation to the SLC. (Tr., 11/23/98, Vol. 8, Part 2, p.50). Plaintiffs' counsel stated that she had no objection. (Tr., 11/23/98, Vol. 8, Part 2, p.50). There being no objection, Mr. Hannon testified as to the before and after reduction percentages for the various age groups. He testified that in the age group 55 and above, the before reduction percentage was eight and the after reduction percentage was seven. In the age group 45 to 54, the respective percentages were 30 percent. In the age group 35 to 44, the figures were 32 percent and 33 percent. In the age group 25 to 34, the figures were 33 percent and 34 percent. In the age group 25 and under, the figures were 7 percent and 6 percent. All of this testimony was given without any objection whatsoever from plaintiffs' counsel.

Mr. Hannon then testified that in the age 55 and above group, there were individuals who were eligible for retirement who asked if they could voluntarily participate in the reduction so that somebody else could stay on. (Tr.,

11/23/98, Vol. 8, Part 2, p.51). He testified that fact skewed the numbers in that age group higher. (Tr., 11/23/98, Vol. 8, Part 2, pp.51-52). At that point, plaintiffs' counsel objected on the ground that the "testimony is not in evidence." She argued that the information had been requested and asserted that it had not been provided to plaintiffs. (Tr., 11/23/98, Vol. 8, Part 2, p.52). Out of the presence of the jury, a discussion ensued.

Plaintiffs' counsel asserted that during discovery, plaintiffs had asked for ". . . any documents generated whatsoever concerning any statistical analysis whatsoever that the company did." (Underlining supplied.) (Tr., 11/23/98, Vol. 8, Part 2, p.53). She asserted that "this data" never came into light during discovery. (Tr., 11/23/98, Vol. 8, Part 2, p. 53). Defense counsel responded that the various computer generated data sheets that were generated that reflect the statistical information were provided to plaintiffs and that the head count reduction forms were provided to the plaintiffs. (Tr., 11/23/98, Vol. 8, Part 2, pp.53-54). Then, defense counsel stated the obvious: "Mr. Hannon is testifying from his memory." Defendant was not introducing any documents. (Tr., 11/23/98, Vol. 8, Part 2, p.54).

Judge Tarnow confirmed from plaintiffs' counsel that she had not deposed Mr. Hannon, despite the fact that he was on the witness list that was provided to her before the close of discovery. In response to Judge Tarnow's inquiry, defense counsel stated that the basis for Mr. Hannon's information would have been the same as that used by Mr. Pautsch (who conducted the adverse impact analysis); the head count implementation reduction forms and information that had been taken from the Rockwell employee information data base. (Tr., 11/23/98, Vol. 8, Part 2, p.56).

Defense counsel affirmed that those documents had been made available to the plaintiffs in the course of discovery. (Tr., 11/23/98, Vol. 8, Part 2, pp.56-57). Judge Tarnow reserved a ruling on the objection and stated that plaintiffs' counsel could cross-examine on this issue. (Tr., 11/23/98, Vol. 8, Part 2, p.57).

Plaintiffs' counsel did cross-examine Mr. Hannon concerning the "list of percentages of people who were reduced". (Tr., 11/23/98, Vol. 8, Part 2, p.107). Mr. Hannon testified that the percentages that he had testified to were the numbers that he remembered from the presentation to the SLC. He testified that those numbers were not documented anywhere. (Tr., 11/23/98, Vol. 8, Part 2, pp.108-109). Subsequently, the cross, redirect and re-cross examination of Mr. Hannon continued. Plaintiffs, thereafter, failed to pursue this issue further.

3. Gregory Brown.

During their case in chief, plaintiffs called Gregory Brown, Vice President of Organization and Management Resources at Meritor. (Tr., 11/17/98, Vol. 4(B), pp.4-5). Plaintiffs' counsel began her examination by questioning Mr. Brown concerning documents produced by Rockwell in response to plaintiffs' discovery requests. (Tr., 11/17/98, Vol. 4(B), pp.5-24). In the course of the examination of Mr. Brown, an issue arose as to whether or not Rockwell had complied with plaintiffs' discovery requests and with Judge Hackett's December 9, 1997 order. (Tr., 11/17/98, Vol. 4(B), pp.30). After a discussion which focused on defendant's Exhibits 60-64, plaintiffs' counsel acknowledged (1) that she had received all the material that Rockwell had in that regard, (2) that all of the information that she wanted to use was contained in the documents that had been

provided to her and (3) that she was satisfied that she had all the information that she needed. (Tr., 11/17/98, Vol. 4(B), pp.37-39).[7] Defense counsel then requested a jury instruction to dispel any suggestion by plaintiffs' counsel that Rockwell had not fully and completely responded to discovery concerning documents. (Tr., 11/17/98, Vol. 4(B), p.41). There being no objection from plaintiffs' counsel, Judge Tarnow instructed the jury that:

> "We've been discussing the [sic] what's called discovery, which is a pretrial exchange of information. And it has been determined that the information that Ms. Guerra is referring to has been and is – has been provided . . . ."

(Tr., 11/17/98, Vol. 4(B), p.45). The direct examination of Mr. Brown continued. (Tr., 11/17/98, Vol. 4(B), pp.46-63). Defense counsel reserved the right to cross-examine or examine Mr. Brown during its case in chief. (Tr., 11/17/98, Vol. 4(B), p.63).

Thirteen days later, on November 30, 1998, Rockwell called Mr. Brown during its case in chief. (Tr., 11/30/98, Vol. 10, p.5). Defense counsel began to question Mr. Brown concerning the testimony he had given two weeks earlier in connection with plaintiffs' Exhibit 19

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[7] Plaintiffs' counsel also stated on the record that she was not asking anymore for any documents associated with the Adverse Impact Analysis other than the three pages admitted as plaintiffs' Exhibit 32. (Tr., 11/17/98, Vol. 4(B), p.40).

"Individual W/Last Day Worked in August 1996", plaintiffs' Exhibit 20, a list of individuals affected by the August 30, 1996 restructuring and plaintiffs' Exhibit 21 "Engineers Hired January 1, 1995 through December 15, 1997". (Tr., 11/30/98, Vol. 10, p.9). Defense counsel stated that the seeming intent of the testimony elicited from Mr. Brown by plaintiffs' counsel two weeks earlier was to show that the "numbers weren't lining up between the three exhibits". (Tr., 11/30/98, Vol. 10, p.10). Mr. Brown was asked what he had done after he had testified on November 17, 1998. He testified that with respect to Exhibit 19, "Individuals W/Last Day Worked in August 1996", he asked his administrative assistant to go back into the payroll system and provide him with the reason for that last day worked. Plaintiffs' counsel objected to the "new information Mr. Brown found out" because it ". . . should have been given to us at the time, and I believe its irrelevant at this point . . . ." The objection was overruled. (Tr., 11/30/98, Vol. 10, p.11). Mr. Brown testified that out of the 20 people listed on Exhibit 19, the severance reason for ten was listed as early retirement. (Tr., 11/30/98, Vol. 10, p.12). Of the remaining ten individuals, five were engineers. Two of them were under 50 and three of them were over 50. (Tr., 11/30/98, Vol. 10, p.13). Mr. Brown was then asked if he looked into why there were 31 names on plaintiffs' Exhibit 20, the list of affected names. (Tr., 11/30/98, Vol. 10, p.14). He testified that any inconsistency between Exhibits 19 and 20 was attributable to the fact that two different dates were utilized to generate the lists and the list grew from 20 individuals to 31 individuals. (Tr., 11/30/98, Vol. 10, p.16). He testified that 11 of the 31 people listed on Exhibit 20 requested early retirement. (Tr., 11/30/98,

Vol. 10, p.16). Of the 19 individuals who were reduced,[8] 5 people were over 50 and 14 were under 50. (Tr., 11/30/98, Vol. 10, p.17).

With respect to plaintiff's Exhibit 21, engineers hired after January 1, 1995, Mr. Brown testified that he had gone back and determined that of the 200 persons listed, 51 were in Troy. Plaintiffs' counsel objected on the ground that the information had never been produced to her. Defense counsel responded that plaintiff had requested a list of engineers that were hired between January 1, 1995 through December 15, 1997 and that was what was provided to her. The objection was overruled. (Tr., 11/30/98, Vol. 10, p.18). Mr. Brown testified that out of the 200 engineers hired worldwide, 173 were hired before the reduction in force and 27 after. (Tr., 11/30/98, Vol. 10, p.19).

Mr. Brown also testified as to the apparent discrepancy between plaintiffs' Exhibit 32, the Adverse Impact Analysis, which showed 46 people affected by the restructuring and plaintiffs' Exhibits' 19 through 21 which showed 31 individuals. (Tr., 11/30/98, Vol. 10, p. 24). He testified that the other 15 were accounted for in activities that happened after August 30, 1996. (Tr., 11/30/98, Vol. 10, p.24). He testified that of those 15, some were retirements, some volunteered to be laid off so that they would receive severance and some co-op students went back to school. (Tr., 11/30/98, Vol. 10, p.25).

After defense counsel completed the examination of Mr. Brown, plaintiffs' counsel was afforded the opportunity

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[8] One person had quit. (Tr., 11/30/98, Vol. 10, p.17, Apx., at p.1957).

to cross-examine him. Mr. Brown was questioned extensively concerning the discrepancies which plaintiffs' counsel perceived to exist with respect to Mr. Brown's immediately preceding testimony and the testimony which he had given on November 17, 1998. (Tr., 11/30/98, Vol. 10, pp.30-65). During the course of the cross-examination, plaintiffs' counsel asked Mr. Brown if Rockwell ever provided plaintiffs with a full list of the information they requested for the people who were caught in the restructuring. (Tr., 11/30/98, Vol. 10, p.40). A side bar conference was then conducted. Plaintiffs' counsel argued that her purpose in pursuing that line of questioning was to show the jury that the defendant was trying to impeach "the lists we were provided . . . ." (Tr., 11/30/98, Vol. 10, p.34). Defense counsel argued that plaintiffs' counsel was again improperly attempting to suggest that Rockwell had not fully complied with plaintiff's discovery request and the December 9, 1997 order. Judge Tarnow directed the lawyers to find and provide him with a copy of the December 9, 1997 order and directed plaintiffs' counsel to continue her questioning. (Tr., 11/30/98, Vol. 10, pp.40-44).

The issue was revisited the morning of the next day, December 1, 1998. Judge Tarnow stated that he had asked the lawyers to ". . . try and decide exactly what happened and whether, in fact, there were discovery violations or not." (Tr., 12/01/98, Vol. 11, p.3). Plaintiffs' counsel responded that ". . . we stipulated to a lot of discovery requests". (Tr., 12/01/98, Vol. 11, p.4). She said that the disagreement related to Exhibit 19 "Individuals W/Last Day Worked in August 1996", which showed 20 names, 10 of which Mr. Brown had testified were early retirees and Exhibit 28 "severed automotive employees as of 08-01-96". (Tr., 12/01/98, Vol. 11, p.4). She stated that she had reviewed both Exhibits and confirmed that Exhibit 28 did

state that 10 of the individuals listed on Exhibit 19 were listed as having taken early retirement. (Tr., 12/01/98, Vol. 11, p.5).[9] She then stated that 4 of those 10 individuals were plaintiffs in an unrelated lawsuit filed against Rockwell alleging age discrimination. She proposed to enter Exhibit 44, ". . . the lawsuit itself mentioning the four people (apparently to show that Mr. Brown's statement and Exhibit 28's evidence regarding 10 early retirements was inaccurate). (Tr., 12/01/98, Vol. 11, p.5).

Judge Tarnow interrupted plaintiffs' counsel and had her confirm that the information was provided to her during discovery and that the individuals were, in fact, marked early retirement. (Tr., 12/01/98, Vol. 11, p.6). Plaintiffs' counsel argued that she understood that Mr. Brown was prepared to come back and testify that individuals who had chosen to take early retirement after they had been involuntarily terminated would be listed as early retirement. She wanted to know how many other people on the list that were listed as early retirement were actually terminated. (Tr., 12/01/98, Vol. 11, p.6). Judge Tarnow told her that that was a question she could have asked during discovery. (Tr., 12/01/98, Vol. 11, p.6). He told her that she had had the information concerning early retirements for nine months. (Tr., 12/01/98, Vol. 11, p.7).

Judge Tarnow then asked defense counsel how to explain the fact that the individuals who were plaintiffs in the unrelated lawsuit were listed as having taken early retirement. Defense counsel stated that those individuals

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[9] A comparison of Exhibits 19 and 28 show that those individuals were Awe, Bornais, D'Souza, Fuller, Gonlou, Heirman, Konior, Kucharski, Phillips and Reyes.

were slated for reduction on an involuntary layoff basis and at some later point in time, they elected to take early retirement. (Tr., 12/01/98, Vol. 11, pp.7-8). Judge Tarnow asked the lawyers why he shouldn't just simply tell the jury that fact. (Tr., 12/01/98, Vol. 11, p.8). Plaintiffs' counsel stated that it would not be satisfactory if there was a stipulation. She argued that because Rockwell gave plaintiffs a list of 20 people who were actually HVS restructuring terminees[10] and because ". . . no one has ever argued before that they were not part of the HVS restructuring . . .", ". . . either all of the names stay on or . . . we have to object." (Tr., 12/01/98, Vol. 11, p.9). Both defense counsel and Judge Tarnow were confused by the argument. (Tr., 12/01/98, Vol. 11, p.9). Plaintiffs' counsel said that she wanted to tell the jury that Mr. Brown was mistaken when he said that those individuals had taken an early retirement. Judge Tarnow suggested that the jury be told that those people on the list (Exhibit 19) who were listed as early retirement (on Exhibit 28) took their early retirement because they were on the list for reduction, because that was what the facts were. (Tr., 12/01/98, Vol. 11, p.10). Plaintiffs' counsel objected because she wanted to tell the jury that those individuals were involuntarily terminated first. (Tr., 12/01/98, Vol. 11, p.11). Judge Tarnow responded that they were not terminated - they were listed for termination. (Tr., 12/01/98, Vol. 11, p.11).

Judge Tarnow then attempted to clarify the issue. (Tr., 12/01/98, Vol. 11, p.11). Judge Tarnow stated that before Mr. Brown had testified, the question was whether all

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[10] Actually, that is not true. Exhibit 20 which lists the "20 people" is entitled "Individuals W/Last Day Worked in August 1996".

of the people listed in the materials provided in plaintiffs' Exhibit 28 were included in the calculation made by plaintiffs' statistician. (Tr., 12/01/98, Vol. 11, pp. 11-12). Judge Tarnow asked whether all of those people (apparently those listed in Exhibit 28 as having taken early retirement) were used in the calculation made by the statistician. Plaintiffs' counsel stated that the statistician did not include those people because they were listed as early retirement. (Tr., 12/01/98, Vol. 11, p.12).

Judge Tarnow suggested that the situation could be rectified by a stipulation telling the jury that those individual's early retirement was caused by them being listed for termination or reduction. (Tr., 12/01/98, Vol. 11, pp.12-13). Judge Tarnow wanted to know if plaintiffs' counsel was satisfied if the jury was told that at least four people who were listed as taking early retirement were, in fact, part of the restructuring. Judge Tarnow reminded plaintiffs' counsel that this information was made available to her in discovery for months and that the presumption is that she had read what she received in discovery. (Tr., 12/01/98, Vol. 11, p.15). After much discussion, a stipulation was eventually reached to resolve the dispute. (Tr., 12/01/98, Vol. 11, pp.16-26). Judge Tarnow read that stipulation into the record:

> "One is that all of the discovery orders and requests have been complied with prior to trial. So, that's not a concern of yours.
>
> As to the second point, when Mr. Brown testified yesterday and talked about early

> retirement, he indicated that the computer elected early retirement – or showed early retirement for ten people, because that was the last entry or employment action which was taken with respect to each of the employees, the four employees. They were, in fact, included in the reduction in force and were laid off prior to electing the early retirement, and therefore there's no need for Mr. Brown to be called back as a witness. And you should take Exhibit 19 as all the people listed in Exhibit 19 were in fact included in the reduction in force. So, Exhibit 19 is exactly the same as before Mr. Brown testified." (Underlining supplied).

(Tr., 12/01/98, Vol. 11, p.27). When asked if that accurately reflected the agreement, plaintiffs' counsel responded that the first point was a "little broader" than what she had agreed to. Judge Tarnow told her that she could take it up at the next break. (Tr., 12/01/98, Vol. 11, p.27). At the next break, plaintiffs' counsel acknowledged that the first point in the stipulation read to the jury was accurate with respect to evidence concerning early retirements but that it was her position that she was not provided all of the head count reduction forms which had been requested. (Tr., 12/01/98, Vol. 11, pp.94-95).

4. Denial of plaintiffs' motion for judgment as a matter of law.

At the close of plaintiffs' proofs, defendant moved for judgment as a matter of law. (Tr., 11/20/98, Vol. 7, pp.71-79). The motion was denied. (Tr., 11/20/98, Vol. 7, p.79). In the course of denying defendant's motion for judgment as a matter of law, Judge Tarnow added that judgment as a matter of law for the plaintiffs was similarly not warranted:

> "That doesn't mean that if Ms. Guerra were to stand up and make a motion for a directed verdict in her favor, that I would grant it, because it's the jury's function now to decide the factual question as to whether or not there was a legitimate business reason and a legitimate use of criteria or whether there was a pretext based on bias." (Underlining supplied).

(Tr., 11/20/98, Vol. 7, p.79).

Notwithstanding Judge Tarnow's statement that he would deny a motion for directed verdict (actually for judgment as a matter of law) if made by the plaintiffs, they did make such a motion at the conclusion of all the evidence. (Tr., 12/01/98, Vol. 11, p.108). Plaintiff's counsel asserted that there was direct evidence of age discrimination. Judge Tarnow responded that there was also evidence that age was not a factor in the decision to

terminate Mr. Varga. (Tr., 12/01/98, Vol. 11, p.109). Plaintiffs' counsel then argued that there was circumstantial evidence that created an inference of age discrimination. (Tr., 12/01/98, Vol. 11, p.110). Judge Tarnow asked plaintiffs' counsel if she knew what an inference was. She responded that an inference is something that a person can glean from evidence. Judge Tarnow responded that the "person" or "someone" who can draw an inference from evidence is the jury and not the court. Judge Tarnow denied the motion since he, correctly, understood plaintiffs' counsel's argument to be that she had simply presented facts in support of plaintiffs' age discrimination claim, which ". . . then makes it a jury question." (Tr., 12/01/98, Vol. 11, pp.110-111).

REASONS FOR DENYING THE PETITION

The Respondent contends that it is unnecessary for this Court to review the decision of the Sixth Circuit Court of Appeals in the present case. The Sixth Circuit correctly determined that plaintiffs' argument concerning documents introduced by Respondent at trial had been waived as a result of plaintiffs' counsel's failure to object to the admission of those documents.

In the Statement of The Case section of their Petition, plaintiffs, under subsection (E), discuss "discovery [allegedly] withheld by Defendant." They discuss (1) Trial Exhibits 69 and 70, (2) head count reduction forms and (3) testimony of Gregory Brown. However, in the Argument section of their Petition, plaintiffs discuss (and this is apparent from the context) only trial exhibit 69 and 70, the documents which Respondent used, successfully, to impeach the testimony of plaintiffs' witness, Larry Lemanski. Since plaintiffs' counsel failed to object to the admission of these documents in the district court, Tr., 11/16/98, Vol. III, pp.40-42 and, as a consequence, failed to raise this issue in the district court, this Court should decline to consider the issue. The general rule is that this Court does not decide questions not raised or involved in the lower court. *Youakim v. Miller,* 425 U.S. 231, 234; 96 S. Ct. 1399; 47 L. Ed. 2d 701 (1976); *Adickes v. Kress & Co.,* 398 U.S. 144, 147; 90 S. Ct. 1598; 26 L. Ed. 2d 142 (1970). Respondent contends that the general rule should be applied here.

With respect to plaintiffs' other (actually first) argument concerning the denial of their motion for judgment as a matter of law, Respondent contends that both the district court and the Sixth Circuit correctly ruled that judgment as a

matter of law in favor of the plaintiffs, the parties having the burden of proof, was properly denied because Respondent presented sufficient evidence from which the jury could, and indeed did, reasonably and legitimately conclude that Mr. Varga's age was not a determining factor in Respondent's decision to include him in the restructuring and reduction in force.

I. WHILE IT IS CORRECT TO SAY THAT THE STANDARD FOR SUMMARY JUDGMENT IS THE SAME AS THE STANDARD FOR JUDGMENT AS A MATTER OF LAW, THAT LEGAL PRINCIPLE WAS NOT BEFORE THE UNITED STATES DISTRICT COURT OR BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. THE ISSUE WHICH WAS PRESENTED TO, AND DECIDED BY, BOTH LOWER COURTS INVOLVED THE DISTINCT QUESTION RELATING TO HOW A MOTION FOR JUDGMENT AS A MATTER OF LAW (OR FOR THAT MATTER A MOTION FOR SUMMARY JUDGMENT) IS TO BE DECIDED WHEN THE MOVANT IS THE PARTY HAVING THE BURDEN OF PROOF. THE DISTRICT COURT PROPERLY DENIED, AND THE CIRCUIT COURT PROPERLY AFFIRMED THE DENIAL OF, PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW MADE AT THE CONCLUSION OF THE PROOFS.

The argument made by the plaintiffs in this regard is without merit. It is without merit because it fails to acknowledge that the standard for granting judgment as a matter of law in favor of the party having the burden of proof, *i.e.*, the plaintiffs here, is different from, and higher than, the standard for granting judgment notwithstanding the verdict in favor of a defendant.

A motion for judgment notwithstanding the verdict[11] raises the issue of whether there was a question of fact for the jury to decide. *Chappell v. G.T.E. Products*, 803 F.2d 261, 266 (6th Cir. 1986), *cert. denied* 480 U.S. 919; 107 S. Ct. 1375; 94 L. Ed. 2d 690 (1987). Judgment notwithstanding the verdict may be granted only if reasonable minds could not differ as to the conclusions to be drawn from the evidence. *Toth v. Yoder Co.*, 749 F.2d 1190, 1194 (6th Cir. 1984). The appellate court is bound by the same standard of review. *Hawley v. Dresser Indus., Inc.*, 958 F.2d 720 723 (6th Cir. 1992); *Roush v. KFC National Mgt. Co.*, 10 F.3d 392, 395 (6th Cir. 1993). *See also Kupkowski v. Avis Ford, Inc.*, 395 Mich. 155, 168; 235 N.W.2d 324 (1975).

The test for granting judgment as a matter of law is different, and the bar is significantly higher, when judgment as a matter of law is sought by the party having the burden of proof.

Courts are understandably reluctant to grant summary judgment,[12] direct a verdict or grant judgment

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[11] The 1991 Amendment to Fed. R. Civ. P. 50(b) changed the name of such a motion to a renewed motion for judgment as a matter of law. The name change did not change the standard under which such a motion may be granted.

[12] The standard for granting summary judgment mirrors the standard for a directed verdict (now judgment as a matter of law – Fed. R. Civ. P. 50). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242; 106 S. Ct. 2505; 91 L. Ed. 2d 202 (1986).

notwithstanding the verdict in favor of a party having the burden of proof. *Hunt v. Cromartie,* 526 U.S. 541; 119 S. Ct. 1545, 1552; 143 L. Ed. 2d 731 (1999); 5A, Moore's *Federal Practice*, ¶ 50.02[1]. p. 50-31; 9A Wright & Miller, *Federal Practice and Procedure* § 2535 (". . . Courts often caution that granting a judgment as a matter of law for the party bearing the burden of proof is reserved for extreme cases . . . . To the extent that the party with burden of proof has established the elements of his case by testimony that the jury is not at liberty to disbelieve . . . judgment as a matter of law in that party's favor may be granted . . . .") (underlining supplied); *Service Auto Supply Co of PR v. Harte & Co.*, 533 F.2d 23 (1st Cir. 1976) (directed verdict in favor of party having the burden of proof is permissible only where the case has been established by testimony that the jury is not at liberty to disbelieve). Judgment as a matter of law in favor of a party having the burden of proof is proper if, but only if, that party produces unimpeached and uncontradicted evidence to prove his case and the opposing party produces no evidence to disprove it. *See, e.g., Daniel J. Hartwig & Assoc., Inc. v Kanner,* 913 F.2d 1213, 1221 (7th Cir. 1990) (no credible evidence to sustain a verdict in favor of party against whom motion is made); *Pence v. United States,* 316 U.S. 332; 62 S. Ct 1080; 86 L. Ed. 1510 (1942); *State Auto Ins. Co. v. Boatwright,* 184 F.3d 492, 498-499 (6th Cir. 1999) ("a ruling in favor of the plaintiffs on this issue would require us to find that the defendants offered no credible evidence contesting the plaintiffs' theory of liability").

Thus, judgment as a matter of law in favor of the party with the burden of proof is appropriate when and only when the evidence presented by the plaintiff would require – as distinguished from permit – the jury to rule in favor of the

plaintiff.[13] *Hunt v. Cromartie, supra; Oney v. Ratliff,* 183 F.30 93, 895 (Fed. Cir. 1999).

The higher standard applied to motions for judgment as a matter of law brought on behalf of the party having the burden of proof was not satisfied in this case. Both lower courts correctly recognized this fact.[14]

In order to successfully carry the ultimate burden in an age discrimination case, the plaintiff must prove that age was a determining factor in the employer's decision. *Matras v. Amoco Oil Co.,* 424 Mich. 675, 683-684; 385 N.W.2d 586 (1986); *Brocklehurst v. PPG Industries, Inc.,* 123 F.3d 890, 895 (6th Cir. 1997).

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[13] The drawing of legitimate inferences from the facts are jury functions, not those of the judge. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255; 106 S. Ct. 2505; 91 L. Ed. 2d 202 (1986).

[14] To be sure, the Sixth Circuit, although ultimately correctly concluding that ". . . it cannot be said that the reasonable minds could not differ on the central question of whether or not Varga's age was the motivating reason for his layoff . . .," did state that ". . . while the evidence recounted in plaintiffs' brief would be enough to withstand summary judgment, . . . the standard for judgment as a matter of law is much higher." At most, the Sixth Circuit can be criticized for imprecision in its writing. It is apparent from that Court's analysis that it meant that the standard for judgment as a matter of law in favor of the party having the burden of proof is much higher than the standard for denying summary judgment and thereafter submitting the case to the jury.

The "bottom-line requirement" of what a plaintiff must establish in any age discrimination case is that age was a determining factor in the employment decision. *Dubey v. Stroh Brewery Co.*, 185 Mich. App. 561; 463 N.W.2d 758 (1990).

In a discrimination case, liability necessarily depends on whether the protected trait, *i.e.*, age, actually motivated the employer's decision. A discrimination claim cannot succeed unless the employee's protected trait actually played a role in the employer's decision-making process and had a determinative influence on the outcome. *Hazen Paper Co. v. Biggins,* 507 U.S. 604; 113 S. Ct. 1701, 1706; 123 L. Ed. 2d 338 (1993). *See also St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502; 113 S. Ct. 2742; 125 L. Ed. 2d 407 (1993). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253; 101 S. Ct. 1089; 67 L. Ed. 2d 207 (1981); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143; 120 S. Ct. 2097; 147 L. Ed. 2d 105 (2000).

When plaintiffs' argument is measured against these standards, there can be but one conclusion and that is that plaintiffs' motion for judgment as a matter of law was properly denied.

One argument made by plaintiffs at the circuit court level demonstrates their misunderstanding of the circumstances under which judgment is a matter of law may be granted in favor of the party having the burden of proof. Plaintiffs contended that their motion for judgment as a matter of law should have been granted because, according to them, the great weight of the evidence established all of

the elements of their age discrimination claim. Plaintiffs did not and do not understand the difference between the sufficiency of evidence and the weight of the evidence. The determination of a case cannot be withheld or withdrawn from the jury and given to one party at the direction of the court in violation of the right to have issues of fact determined by the jury. Therefore, the critical question in deciding whether to grant judgment as a matter of law is whether there is an issue of fact which must be submitted to the jury. While a motion for a new trial may be granted if the verdict is against the great weight of the evidence, judgment as a matter of law may be granted if, and only if, there is insufficient evidence to make an issue for the jury. In making a "great weight of the evidence" argument, plaintiffs implicitly acknowledged the existence of evidence offered by the defendant which was to be weighed against their evidence and, therefore, implicitly acknowledged the existence of questions of fact. *See National Equipment Rental, Ltd. v. Stanley,* 177 F. Supp. 583 (D.C. N.Y. 1959). The acknowledged existence of questions of fact for jury resolution demonstrates beyond question the propriety of the denial of plaintiffs' motion for judgment as a matter of law.

II. THIS COURT SHOULD DECLINE TO REVIEW PLAINTIFFS' ARGUMENT CONCERNING THE ADMISSION OF EVIDENCE USED SOLELY FOR THE PURPOSE OF IMPEACHMENT BECAUSE THE ARGUMENT MADE BY PLAINTIFFS IN THE SIXTH CIRCUIT WAS NOT MADE IN THE DISTRICT AND THE ARGUMENT MADE BY THE PLAINTIFFS NOW WAS NOT MADE IN EITHER LOWER COURT.

At the Sixth Circuit level, plaintiffs argued that Trial Exhibits 69 and 70 had been improperly admitted. Yet, it is undisputed that their lawyer failed to object to the admission

of those documents which were used by Respondent to impeach plaintiffs' witness. Under these circumstances, the argument has not been preserved for appellate review since evidentiary rulings are reviewed under an abuse of discretion standard and one cannot say that a trial judge has abused his discretion when never asked to exercise it.[15] Now, in their Petition, plaintiffs, for the first time in this case, accuse Respondent of committing "fraud on the court rules." A question presented in a petition which was not raised in the Court of Appeals is not properly before this Court. *Delta Airlines v. August,* 450 U.S. 346, 362; __ S. Ct. __; __ L. Ed. 2d (1981). Simply put, raising an issue for the first time in a case in a petition for writ of certiorari before this Court is too late.

There are additional reasons why this Court should decline to consider the issue. The case relied on by the petitioners, *Demjanjuk v. Petrovsky,* 10 F.3d 388 (6th Cir. 1993), and the cases which it in turn relies on, *Hazel-Atlas Glass Co. v. Harford Empire Co.,* 322 U.S. 238; 64 S. Ct. 997; 88 L. Ed. 1250 (1944) and *U.S. v. Throckmorton,* 98 U.S. 61; 25 L.Ed. 93 (1878), are distinguishable at their

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[15] The failure to timely object or file a motion to strike evidence waives the right to have the evidence excluded and constitutes a failure to preserve the issue for appellate review. F.R.E. 103(a)(1); *Helminski v. Ayerst Laboratories, a Div. of American Home Products,* 766 F.2d 208, 211 (6th Cir. 1985); *Torres v. Johnson Lines,* 932 F.2d 748, 752 (9th Cir. 1991). The failure to timely object to testimony on the ground that the entire content of such testimony had not been disclosed during discovery constitutes a waiver of the objection. *Finch v. Hercules, Inc.,* 941 F. Supp. 1395, 1415 (D. Del. 1996).

cores. The fraud committed in *Demjanjuk, supra,* was the suppression of exculpatory evidence. The fraud in *Hazel-Atlas Glass Co., supra,* and *Throckmorton, supra,* consisted of presenting false documents to the Court. Common to all three cases was a suppression of the truth. Here, by contrast, Respondent's use of Trial Exhibit 69 and 70 resulted in the truth being told.

Lastly in this regard, Respondent contends that its actions in not disclosing documents which were used solely for impeachment purposes at trial to establish the truth were justified and correct. Case law (*see Halbasch v. Med-Data, Inc.*, 192 F.R.D. 641 (D. Or. 2000) and the cases cited therein) and logic (production or even identification of impeachment evidence completely destroys its value) support Respondent's position. This argument will be set forth in depth in the event that this Court grants certiorari.

CONCLUSION

Respondent respectfully requests the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,
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